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42 pgs (12)

No. 06-1463

FILED
DEC 2 , 2007
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE
**Supreme Court of the United States**

ARNOLD M. PRESTON,

*Petitioner,*

v.

ALEX E. FERRER,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**

# REPLY BRIEF FOR THE PETITIONER

Joseph D. Schleimer
*Counsel of Record*
Kenneth D. Freundlich
SCHLEIMER & FREUNDLICH, LLP
9100 Wilshire Boulevard
Suite 615 - East Tower
Beverly Hills, CA 90212
(310) 273-9807

*Counsel for Petitioner*

December 23, 2007

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## INTRODUCTION

Respondent and his amicus, William Morris Agency, have made a number of factual allegations without citation to the record. Since Judge Ferrer failed to introduce any evidence during the Superior Court proceedings, if his counsel had provided citations, it would have underscored the fact that *none* of his averments are based on *evidence*.

In her dissent, Justice Miriam Vogel commented on the total lack of evidence to support Judge Ferrer's case, stating:

> There is yet another reason to reverse. Ferrer established his "colorable" defense under the Talent Agencies Act *by argument, not by evidence*, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, *there is no evidence at all* to support issuance of the preliminary injunction, and this fact alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442) [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra*, 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts

necessary to his defense].)

Petitioner's Appendix ("Pet. App.") 17a, n.8 (Emphasis added)

The legal issue presented to this Court is FAA preemption, and the specific question is whether Respondent must present his allegations to an arbitrator. In this context, the *ipse dixit* allegations by Respondent and his amicus, including facts asserted for the first time in the Supreme Court, should be disregarded, or stricken. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 287 (2006) ("aspersions" unsupported by the record); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (argument unsupported by the record and not presented to state court); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) ("Manifestly, it [an unsworn statement of a witness not in the record of the proceedings below] cannot be properly considered by us in the disposition of the case.")

This case arises from a hearing on Petitioner Arnold M. Preston's Motion to Compel Arbitration and Respondent Alex E. Ferrer's Motion for a Preliminary Injunction. The factual presentation in the Superior Court was limited and tightly focused on whether Petitioner "solicited" or attempted to "procure" work for Judge Ferrer on television, acts which require a license under the California Talent Agencies Act ("TAA"). See, Appellant's Appendix before the Court of

Appeal ("A.A.") 1–253.

On the factual issue of "solicitation or procurement," Mr. Preston submitted a sworn declaration, *denying* the allegation. A.A. 103–105. Judge Ferrer submitted *no evidence* to support the allegation. Thus, it is misleading for Respondent's Brief to assert that certain matters are "undisputed," and then state that Mr. Preston "clearly and repeatedly sought to procure employment for Ferrer in the television industry. . . ." Respondent's Brief ("R.B.") 12. Actually, the allegation was *refuted* by Mr. Preston's declaration, so it was Mr. Preston's sworn *denial* which was effectively "undisputed" in the courts below.

### A. Labor Commissioner Proceedings are Not "Expeditious"

The primary reason why private parties enter into arbitration agreements is to provide an expeditious and economical means of dispute resolution. For that reason, this Court stated, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 22 (1983):

> Congress's clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration *as quickly and as easily as possible*. (Emphasis added)

Respondent repeatedly asserts, ipse dixit, that proceedings before the California Labor Commissioner

are "expeditious." R.B. 6, 15, 24, 34. Indeed, Judge Ferrer goes so far as to dispute the time estimate of the dissent (R.B. 34, n.7), where Justice Vogel criticized the majority for allowing Respondent "to cause a *delay of years* and triple or quadruple the parties' expenditures." Pet. App. 17a (emphasis added).

Labor Commissioner proceedings under the TAA are *not* "expeditious." Quite the contrary, they can, and often do, take *several years* to reach a determination at the administrative level. See, e.g., *James v. Thompson Management*, TAC 17-03 (36 months from filing to administrative decision); *Padilla v. Clymer*, TAC 60-94 (41 months); *Thomas Haden Church v. Ross Brown*, TAC No. 52-92 (24 months); *William Morris Agency, LLC v. O'Shannon*, TAC 06-05 (31 months); *Kilcher v. Vainshtein*, TAC 02-99 (28 months); *Patterson v. Black Orchid Entertainment*, TAC 39-05 (17 months); *Smith v. Harris*, TAC 53-05 (21 months); *Tyler v. Laugh Factory Management*, TAC 31-01 (51 months). The Labor Commissioner selectively publishes decisions at www.dir.ca.gov/dlse/DLSE-TACs.htm

Administrative proceedings under the TAA are merely a *prelude* to protracted and costly litigation in the courts. A good case in point is *Marathon Entertainment v. Blasi*, 45 Cal.Rptr.3d 158 (2006), in which the manager sued for fees on February 21, 2003. The defendant filed the inevitable Labor Commissioner petition, so there was an administrative hearing, which was followed by a de novo proceeding in the Superior Court, then a review in the Court of Appeal, followed by a review in the California Supreme Court.

The California Supreme Court heard oral argument on November 6, 2007, which means, as of this writing, that the case is now 4 years, 10 months old – and it is still not final. http://appellatecases.courtinfo.ca.gov (No. S145428)

If the California Supreme Court *affirms* the Court of Appeal in *Marathon,* the case will then be *remanded to the Labor Commissioner* for a new administrative hearing, followed by another de novo trial, and then another appeal. Hence, the aptly-named *"Marathon"* case may yet drag on for 10 years, or more, before reaching finality.

Compare that with arbitration. If Judge Ferrer had honored his promise to arbitrate, the hearing on the merits (including the TAA issue) would have taken place on January 26, 2006, less than *eight months* after Petitioner's June 4, 2005 arbitration demand. Joint Appendix ("J.A.") 7, 30.

The procedure established by the Court of Appeal in this case actually managed to make arbitration take longer, and cost more, than a court trial. The reason for that is, when an artist's manager files a lawsuit, the Superior Court will hear the breach of contract claim simultaneously with a *de novo* hearing of the TAA defense. *Styne v. Stevens,* 26 Cal.4th 42, 62 n.14 (2001)("Any appeal de novo from the Commissioner's decision. . .may, of course, be consolidated with the pending superior court contract action.")

Here, pursuant to the Court of Appeal's holding,

the parties must first go through an administrative procedure, followed by a de novo trial in the Superior Court, no doubt followed by another trek through the appellate courts, and then, once a final decision is rendered in the courts, the parties *may* be allowed to finally arbitrate. Unless, of course, there is a remand from the appellate courts, at which point the process will start all over again.

As Justice Vogel put it, in her dissent, "that is not how it is supposed to work."

### B. De Novo Hearings are Conducted by the Superior Court

As part of his "expeditious" theme, Respondent repeatedly urges that the arbitrator in this case would have somehow regained his jurisdiction, conducted the *de novo* hearing, and made the final decision on the "validity or legality" of the contract. R.B. 2–6, 13–15, 24, 30–35, 44, 51.

In the courts below, Judge Ferrer took the *opposite* position, by consistently, vigorously and repeatedly urging that the Superior Court would hear the de novo appeal, and the arbitrator should *never* be allowed to rule on any issue.

In his Complaint in the Superior Court, filed November 2, 2005, Judge Ferrer prayed:

> That *the court* determine and declare that the existing controversy between Plaintiff [Ferrer] and Defendant

> [Preston] arising from the Contract, including in particular the issue of the validity of the Contract, *is not subject to arbitration*. . . .

J.A. at 29 (Emphasis added)

Likewise, in opposing Petitioner's Motion to Compel Arbitration, Judge Ferrer argued that the de novo hearing would be conducted *by the Superior Court*, not the arbitrator:

> [I]f, after conducting the forthcoming evidentiary hearing, the Commissioner rules that the Contract is void, Preston may appeal that ruling and have a hearing de novo *before this Court* on that issue....[U]nder the Act, *this Court would acquire jurisdiction* over the parties' dispute as to the validity of the Contract only after the Labor Commissioner has heard and decided that dispute and the losing party has appealed within 10 days after the determination.
>
> ....
>
> [I]f the losing party chooses to appeal the Commissioner's decision entered after that hearing, he has the right to *appeal to this Court*, which will hear and decide the issue de novo, at which time Preston may again present evidence in support of his assertions going to the merits of Ferrer's contract invalidity argument.

A.A. at 157 n.1, 163–164 (Emphasis added).

Under the Court of Appeal's ruling, the chance the de novo hearing will be conducted by the arbitrator is *nil*. For one thing, California law expressly provides that *the Superior Court* conducts the de novo hearings, after a determination by the Labor Commissioner. As stated in Labor Code §1700.44(a):

> In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, *to the superior court* where the same shall be heard de novo." (Emphasis added)

Since the Court of Appeal ruled on *jurisdictional* grounds, and cited Labor Code §1700.44 as giving the Labor Commissioner "exclusive" jurisdiction to hear TAA issues (Pet. App. 5a–6a), and since Labor Code §1700.44 also vests jurisdiction in the Superior Court to conduct the de novo hearing, it is perfectly clear that the Court of Appeal's decision diverted this case from the arbitrator onto a circuitous "track" which led, via the Labor Commissioner, right back into the court system.

Moreover, the 10-day appeal period in Labor Code §1700.44 is jurisdictional. If the losing party fails to file a notice of appeal *in the Superior Court* within 10 days, the Labor Commissioner's determination becomes a binding judgment. Labor Code §§ 98.2(d),

1700.44(a); *REO Broadcasting Consultants v. Martin*, 69 Cal.App.4th 489, 495 (1999); *Sinnamon v. McKay*, 142 Cal.App.3d 847 (1983). See, also, *Buchwald v. Superior Court*, 254 Cal.App.2d 347 (1967), sub nomine *Buchwald v. Katz*, 8 Cal.3d 493 (1972)(arbitrator enjoined; hearing de novo under Labor Code §1700.44 to be conducted by the Superior Court).

If Mr. Preston had not appealed, and chose instead to defend before the Labor Commissioner, the arbitrability issue would have been *waived*, because an order denying arbitration is immediately appealable. See, California Code of Civil Procedure §1294(a); 9 U.S.C. §16(a); *Cotton v. Slone*, 4 F.3d 176, 179–80 (2nd Cir. 1993)(failure to timely appeal denial of motion to compel arbitration, together with active litigation activity, waived right to appeal denial of arbitration).

Moreover, if the U.S. Supreme Court had not granted certiorari, the anti-arbitration holding of the Court of Appeal would have been not just the Law of the Case, but *controlling* law in California.

(Even without a Law of the Case problem, there was never going to be a *second* Motion to Compel Arbitration, because California imposes severe sanctions, including *contempt of court*, on attorneys who try for "a second bite at the apple" without a showing of "new or different facts." California Code of Civil Procedure §§ 1008(a), (b), (d).)

Judge Ferrer's *new* position, that the Labor Commissioner proceeding would have (or might have) been followed by an immediate arbitration, is further

belied by his procedural maneuvering in the courts below, leading up to the events of December 6, 2005 and December 7, 2005:

On October 12, 2005, the arbitrator denied Judge Ferrer's motion for a stay and held that he had jurisdiction to arbitrate the validity or legality of the contract under the TAA. J.A. 24–25. In his written opinion, the arbitrator specifically cited Labor Code §1700.45 and *Styne v. Stevens*, 26 Cal.4th 42, 58 n.9 as *allowing* the parties to arbitrate contract-legality issues under the TAA. *Id.*

Pursuant to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the jurisdictional dispute should have ended right there. Simply put, under the FAA, *the arbitrator had jurisdiction to decide arbitrability*, he made his ruling, and the next step *should* have been an arbitration on the merits.

Instead, on November 2, 2005, Judge Ferrer filed this lawsuit, seeking an injunction against the arbitration. As quoted above, his Complaint sought a declaration by the Superior Court that the entire contract was void, and based thereon, he sought to *enjoin* the arbitrator who had already ruled against him. J.A. 26–29.

The hearing on Judge Ferrer's injunction motion was set for December 7, 2005. One day before the injunction hearing, on December 6, 2005, Respondent brought a reconsideration motion to the arbitrator. With the injunction looming the *next day*, the arbitrator reconsidered and stayed his own arbitration

proceeding, noting that "it is not cost effective to have parallel proceedings simultaneously pending. . . ." J.A. 38.

The reconsideration reaffirmed the arbitrator's own jurisdiction, but stated that he would wait for the Labor Commissioner to make what would have been, in substance and practical effect, an *advisory* ruling. J.A. 38.

On December 6, 2005, after the arbitrator's reconsideration order, Judge Ferrer could have withdrawn his injunction motion, proceeded to the Labor Commissioner for an advisory ruling, then returned to the arbitrator for a final decision. Instead, the next day, December 7, 2005, Judge Ferrer proceeded with his injunction motion, and obtained the anti-arbitration injunction which is now before this Court.

Judge Ferrer's strategy was to file collateral attacks against the arbitration, and use the injunction to cause years of delay. He achieved his goal, and would have vigorously opposed any attempt to reinstate the arbitration.

The purpose of an arbitration agreement is to provide an expeditious, economical, and efficient means for adjudicating disputes. The moment he filed this lawsuit, Judge Ferrer *dishonored* his contractual promise to arbitrate and deprived Mr. Preston of the "benefit of the bargain."

As this Court has noted, allowing one party to

ignore the contract and resort to the courts "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

### C. Arbitration Will Adequately Protect Those Covered by the Talent Agencies Act

Much of the presentation by Respondent and his amici centers on a public policy argument, that the TAA supposedly protects "vulnerable individuals" who need special protection, and they will supposedly not get it if required to arbitrate.

This Court has considered this argument before, and found that arbitration is an adequate method for resolving civil claims based on statutes, since the aggrieved party still has the right to file a grievance with the applicable government agency. *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 27–28 (1991)(aggrieved party may file a grievance with the EEOC, but must *arbitrate* any monetary claim against an employer because "[w]e do not perceive any inherent inconsistency between those [public] policies . . .and enforcing agreements to arbitrate...."); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002)(government agency may file action in its own name, notwithstanding private agreement to arbitrate). See, also, *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085, 1089–1090 (5th Cir. 1987) (employee retains right to file a grievance with the EEOC, even after signing a release.).

Another problem with Respondent's public policy argument is, California *repealed* the licensing requirement for "artist's managers" in 1978. Since then, only "talent agents" (who collect and handle large sums for their clients) are required to get licenses. TAA, Labor Code §1700, *et. seq.* Thus, for almost 30 years, artist's managers like Mr. Preston have *not* needed a license in California. *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal.App.4th 246, 252 (1995)("Unlike a talent agent, a 'personal manager' is not covered by the Act or any other statutory licensing scheme.")

In 2001, the California Supreme Court explained the difference between talent agents (who must have licenses) and managers (who are not required to have licenses) in *Styne v Stevens*, 26 Cal.4th 42, 50-51 (2001):

> [The Talent Agencies] Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) . . .nor does it govern assistance in an artist's business transactions other than professional employment. (Emphasis in

original)

Prior to 1978, "artist's managers" required licenses in California, but in 1978, the California Legislature *de-regulated artist managers*, exempting them from the licensing requirement. Calif. Stats. 1978, Ch. 1382, §6, amending Labor Code §1700.4(a). Prior to the 1978 legislation, the statute was titled the "Artist's Managers Act," and managers *were* required to have licenses. The1978 amendment renamed it the "Talent Agencies Act," and for the past 30 years, *only talent agents* have been required to have licenses.

Four years after the deregulation, in 1982, the Legislature assigned the California Entertainment Commission ("CEC") the task of studying the de-regulation, and the CEC reported on December 2, 1985 that the de-regulation of artist's managers was a *success*. In its report, the CEC specifically recommended *against* reinstating the license requirement for artist's managers:

> There is no need to license personal managers. . .[and] [t]here is no rationale or practical justification for the enactment of a law requiring the licensing of personal managers. . . . ¶There is no justification for licensing personal managers. It is not, in fact, the person who is being licensed by the Talent Agencies Act; rather, it is the activity of procuring employment.

*Entertainment Industry Commission Report of*

*December 2, 1985*, at 30–31 (A.A. 145, 151-152).

Talent agents (also known as "booking" agents) usually have a long client list and many of them have minimal client contact. Except for the elite talent agents, they tend to operate a volume business, sending large numbers of clients out on auditions, collecting the clients' salaries, taking their commissions, and offering little in the way of career guidance. Since the talent agencies *handle a lot of client money*, they are required to maintain trust accounts, and to obtain a license they must provide fingerprints, character references, and a $50,000 bond. Labor Code §§ 1700.5 – 1700.22.

By contrast, artist's managers (also known as "personal" managers) do not "book" engagements and they normally do *not* collect and handle client money. (See, Mr. Preston's management contract, which provides that client funds will be handled by a third-party business manager. J.A. 14–15.) Most managers have only a handful of clients, and sometimes they have only *one* client. Managers are "full service" client advisors, providing consultation, career advice, guidance, counseling and administration. No license is required to perform these advisory functions.

Artist's Managers *work hard* for their fees by assisting in the selection, firing and supervising of talent agents, business managers, and lawyers; "coaching" clients on how to dress, behave, interview, audition, and interact with producers, directors, and journalists; and helping clients make critical, strategic career decisions, such as which roles to accept and

which acting jobs to turn down. *Waisbren*, supra, 41 Cal.4th at 252–253.

Managers also help protect their clients from the "dark side" of Hollywood, including stalkers, extortionists, and embezzlers, and often serve *in loco parentis*, making sure the client makes it to the set on time, steering troubled clients into rehabilitation, organizing "drug interventions" for the ones who won't get treatment willingly, and keeping (or bailing) their troubled clients out of jail.

Contrary to the assertion in Respondent's Brief, artist's managers are *allowed* to negotiate artist contracts, if they have the consent of the talent agent. Labor Code §1700.44(d). Additionally, a lot of artist's managers, including Petitioner Arnold M. Preston, are also *attorneys*, who can negotiate on behalf of clients in their capacity as duly-licensed members of the bar.

In a case, like this one, which involves the William Morris Agency ("WMA"), the largest talent agency in the world, the most important function the lawyer-manager performs is to provide *independent counsel* to the client. To fully appreciate the need for this service, the Court should be familiar with two terms of art in the television industry: the "packaging fee" and the "hip pocket client."

WMA discloses, in its amicus brief, that it collects a "packaging fee" from the producers of the *Judge Alex* television show, consisting of 5% of gross revenues. Amicus Brief of William Morris Agency ("W.M.A. Brief") 5. Obligingly, WMA also provides this

explanation of what that is:

> WMA "packages" the different elements and constituents for successful television programming and content: actors, directors, producers, writers and show concepts. . . .¶WMA receives a "series packaging fee" for this television program, consisting of 5% of gross receipts, which is the standard commission on first run syndication.

W.M.A. Brief 4-5

Curiously, WMA's brief then goes on to make the assertion that "Judge Alex Ferrer was never a William Morris client." W.M.A. Brief 5. This peculiar, uncited averment (which Petitioner disputes) poses an important question: Since *Judge Alex* is a generic "TV judge" format, and the personality of the Hon. Alex E. Ferrer was the only bona fide "element," if WMA did not "represent" Judge Ferrer, how did it wangle a lucrative packaging fee on his syndicated television program?

The answer is, Respondent was a "hip pocket" client of the agency, an ambiguous status where a talent agency books the client for an audition or interview, but refrains from executing a written agency agreement. Under this "hip pocket" arrangement, it was WMA which "solicited and procured" Respondent's engagement on *Judge Alex*, and that gave WMA control over the key "element," i.e., they had Respondent in their "hip pocket." It was

this *control* over the submission of Respondent to the producers which gave WMA the *leverage* to exact a multi-million dollar "package fee," an arrangement which will last for the life of the program, and is very likely to yield more income to WMA than Judge Ferrer makes in salary.

Savvy artists who find themselves in "hip pocket" status quickly realize they need *independent counsel*, so they hire a lawyer, or a manager. In the case of Judge Ferrer, who is one of the more savvy "artists" to migrate to Hollywood in a long time, he hired Arnold M. Preston, Esq., whom he knew was *both* a lawyer *and* a manager. (Contrary to Judge Ferrer's unsworn allegation, when he found out that Mr. Preston was leaving the William Morris Agency, he *asked* Petitioner to manage him, and he was *not* pressured to sign the contract.)

"Package fees" have been sharply criticized. As explained in D. Zelenski, Note, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 Southern California Law Review 979, 999–1000 (2003):

> [B]ecause packaging agents effectively act as producers, they necessarily face a conflict of interest.
>
> Agents function as packagers when they put together teams of clients – for example, writers, directors, and actors – and sell those teams to employers for percentage fees instead of commissioning

> each separate client's deal individually . . . . Agents can charge such high amounts because, as described above, franchise agreements only restrict amounts that *clients* can be charged, not amounts that *employers* can be charged.
>
> . . . .
>
> This conflict of interest effectively goes unremedied under the traditional regulatory scheme. Aggrieved clients can attempt to have their representation contracts rescinded on the ground that their agents have violated some type of fiduciary duty, but as discussed above, most would choose not to, presumably out of a concern that if they did speak out, they would brand themselves as troublemakers and so make it difficult to obtain future representation.

The amount of money involved in "packaging fees" explains why the talent agents are eager to self-deal – and why they are not eager to have their "hip pocket" clients retain independent counsel. For example, WMA reportedly made "packaging" fees on the *Cosby* show in excess of $100,000,000, merely by introducing Bill Cosby to the producers. J. Horn, *TV Package Deals Leave Agencies Awash in Riches*, Chicago Tribune, September 26, 1989 (1989 WLNR 2533775). Likewise, WMA and the other "major" talent agencies have reportedly made "packaging" fees in the eight-figure range on such programs as *Friends* ($50,000,000), *Roseanne* ($25,000,000), and *Murphy Brown* ($25,000,000). See, S. Hofmeister, *Company*

*Town: For CAA and Television, It's One Step Forward and Two Steps Back*, Los Angeles Times, November 7, 1995 (1995 WLNR 4847211); A. Frutkin, *Agents of Change*, Media Week (USA), March 22, 1999 (1999 WLNR 7803870).

This is the context in which Judge Ferrer, and his amici, argue that "vulnerable individuals" need special protection against the perils of *arbitrating* with their personal managers. Suffice it to say, there was a very good reason why the California Legislature deregulated the personal managers 30 years ago, but to this day California law still requires the *talent agents* to be bonded, licensed, and *fingerprinted.*

### D. The Court of Appeal's Circular Reasoning is Preempted

The Court of Appeal's "exhaustion" requirement imposed a condition precedent to arbitration which is purely a judge-created rule, because the TAA specifically exempts arbitration from the exhaustion requirement. Labor Code §1700.45 states, in relevant part:

> If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

Thus, while Respondent and the Court of Appeal speak in terms of Petitioner's obligation to "exhaust" administrative remedies, Mr. Preston never had any such obligation; the sole issue referred to the Commissioner was a *defense*, asserted by Respondent. J.A. 20–23, 26–29. And that defense consisted of an assertion that *the entire contract was void*, under the TAA. J.A. 20–23, 26–29. And that is why the issue now comes before this Court, because under the FAA, arbitration agreements are severable, and Judge Ferrer's attack on the *entire contract* is arbitrable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

Respondent makes an extensive argument about the details of the anti-arbitration statute, but the Court of Appeal's interpretation of a California statute is not at issue here. What is before this Court is the fact that the strained statutory reasoning of the lower court gave effect to a lingering judicial bias against arbitration. To divert the "validity and legality" issue away from the arbitrator, the Court of Appeal held, as its primary reason, that Labor Code §1700.44 grants exclusive jurisdiction to the Labor Commissioner. The Court of Appeal then construed the above-quoted "saving" clause, Labor Code §1700.45, a provision which, by its terms, only applies to talent agents, as not applying to artist's managers. (As part of the 1978 de-regulation of artist managers, Labor Code §1700.45 was amended and the term "artist's managers" was deleted and replaced with the term "talent agency." West's Annotated Code, Labor Code §1700.45.)

To achieve the desired result, the Court of

Appeal employed a roundabout theory that Petitioner, although an artist's manager and not subject to Labor Code §1700.45, has been *accused* of violating the TAA, and that accusation triggers the TAA because he may have been a *de facto* talent agent, but Mr. Preston does not benefit from the "saving" clause because he is *not* a talent agent, and therefore he cannot arbitrate the issue of whether, in fact, he acted unlawfully as a de facto talent agent.

In her dissent, Justice Vogel criticized this reasoning as *circular*:

> [In] *Styne v. Stevens*, [26 Cal.4th 42, 54-56, n.9 (2001)] the [California] Supreme Court expressly rejected an argument that its holding would undermine. . . arbitration. . .noting that "[n]othing in [its] reasoning restricts" the parties' right to provide in their contract that their disputes shall be resolved by private arbitration rather than by the Commissioner. (*Id.* at p. 59, fn. 9.)
>
> My colleagues, *assuming their own conclusion*, dismiss this language on the ground that the arbitration provision before us does not conform to the Talent Agencies Act's requirements as set out in Labor Code section 1700.45. (Maj. opn., p. 6, fn. 2.) Their approach ignores the fact that the parties signed a "Personal Management Contract," not a Talent Agent's Contract, and the only reason the

> Talent Agencies Act is relevant is that Ferrer claims the agreement is not what it appears to be and that Preston was in fact acting as an unlicensed talent agent. Based on the parties' agreement, this threshold issue -- which quite plainly has to do with the "validity" and "legality" of the contract -- must be decided by the arbitrator, not the Commissioner or the trial court. (Cf. *Buckeye Check Cashing, Inc. v. Cardegna* (2006) [546 U.S. 440 ]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444.)

Pet. App. 15a (Emphasis added)

Since virtually every effort by an artist's manager to collect fees in California is greeted by a TAA defense, the practical effect of the Court of Appeal's ruling is that the entire profession of artist's managers has effectively lost the right to arbitrate.

Moreover, the Court of Appeal has implemented a *per se* rule, because there was *no evidence* before the Superior Court to support the allegation Petitioner had violated the TAA. Indeed, the only evidence before the lower courts was the uncontradicted Declaration of Arnold M. Preston, who attested that he did *not* violate the statute. A.A. 103–105. In other words, pursuant to the holding of the Court of Appeal, the manager loses the right to arbitrate as soon as a "colorable" accusation of a TAA violation is made, and it makes no difference whether the allegation is supported by evidence, nor does it make any difference if the

manager proves, as part of a motion to compel arbitration, that the allegation is *false*.

Petitioner submits that the Court of Appeal's holding is preempted by the FAA. As stated in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996):

> Courts may not. . .invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U.S., at 281, 115 S.Ct., at 843; *Perry*, 482 U.S., at 492, n. 9, 107 S.Ct., at 2527, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus *displaces* the Montana statute with respect to arbitration agreements covered by the Act. (Emphasis added)

### E. *Volt* and *Mastrobuono*

Respondent cites and relies heavily on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). Petitioner respectfully submits the relevant precedent is *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), since *Volt* is inapposite, for several reasons:

First, *Volt* was a multi-party litigation, in which some of the warring factions were not bound by the arbitration agreement. The pendency of the *third party* litigation was critical in *Volt*, because this Court's affirmance was based on a theory that California Code of Civil Procedure §1281.2(c) was incorporated into the contract, and that Code section only applies when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a *third party*, arising out of the same transaction or series of related transactions...." (Emphasis added)

*Cf.*, *Cronus Investments, Inc. v. Concierge Services*, 35 Cal.4th 376, 383, 385, 392 (2005)(The presence of *third parties* in litigation avoids preemption under *Volt*. The FAA has no provision dealing with the "multiparty dispute" problem, so there is no conflict with state law.).

Here, there are no unbound "third parties." Both of the collateral proceedings were filed by Judge Ferrer, to disrupt and terminate the arbitration. Since he is signatory to the agreement to arbitrate, filing those collateral actions was a breach of the contract.

*Volt* is simply not applicable, because it only applies when there is an intertwined and potentially conflicting litigation with *third parties* who have never agreed to arbitrate.

Second, the ratio decidendi in *Volt* was the "intent of the parties" as to a subject (the power of the court to stay pending resolution of the third-party litigation) on which the contract was *silent*. After drawing an inference from the choice-of-law clause, the *Volt* decision reiterated that "Congress' principal purpose" in enacting the FAA was "ensuring that private arbitration agreements are enforced according to their terms....." *Volt*, 489 U.S. at 478.

Here, the contract has an *express term* that the parties will arbitrate the "validity or legality" of the contract. J.A. 18. Thus, Respondent argues that the Court should extend *Volt* and infer an intent on the part of Messrs. Preston and Ferrer to *negate an express term of the agreement to arbitrate.*

This tortured reading of the contract clashes with the fundamental principal of contract law that an *express* term of a contract trumps an *implied* term. As stated in *Lincoln Electric Company v. St. Paul Fire and Marine Insurance Company*, 210 F.3d 672, 684 (6th Cir. 2000):

> There can be no implied promises in a contract in relation to any matter that is specifically covered by the written terms of the contract.

See, also, *Corso v. Creighton University*, 731 F.2d 529, 533 (8th Cir. 1984) ("It is also axiomatic that where general and specific terms in a contract may relate to the same thing, the more specific provision should control.").

Moreover, under the FAA "any doubts concerning the scope of arbitrable issues is to be resolved in favor of arbitration. . . ." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24–25 (1983).

Petitioner submits that the proposed extension of *Volt* to *contradict* an express agreement to arbitrate "validity or legality" of the contract flies in the face of these well-established principles. See, 11 *Williston on Contracts (4th Ed, 1999)* §32:10 ("Where general and specific clauses conflict, the specific clause governs the meaning of the contract."); *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3rd Cir. 2005) (ALITO, J.)(Words in a contract should be given their ordinary meaning and should not be "tortured" to impart ambiguity where none exists). See, also, California Code of Civil Procedure §1856(a); California Civil Code §1638, 1639; *Dore v. Arnold Worldwide, Inc.* 39 Cal.4th 384, 389–391 (2006) (clear and unambiguous contract language governs).

Another major difference between *Volt* and this case is, *Volt* was strictly a question of procedural priority, and it did not involve an attempt to divert a *particular issue* away from the arbitrator and send it to another tribunal.

In *Volt*, the stay was to break up a litigation log jam, and impose "the efficient order of proceedings" in a case where the arbitrator lacked jurisdiction to decide the whole case. Here, by contrast, the sole purpose of the stay was to *divert a particular issue away from the arbitrator*, for a decision by other tribunals.

Petitioner submits that Judge Ferrer's proposed extension of *Volt* is not just illogical, it is inconsistent with *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995), where this Court stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass *substantive principles* that New York courts would apply, but not to include special rules limiting the authority of the arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another; one foreclosing punitive damages, the other allowing them. This interpretation is untenable. (Emphasis added)

Respondent's argument sets up a similar conflict, asserting that the choice-of-law provision impliedly negates the express agreement to arbitrate

the "validity or legality" of the contract. Even if that was a reasonable interpretation of the choice-of-law clause (which Petitioner disputes), under well-settled and universal rules of contract interpretation, the *specific* term should prevail over any theory of implied intent.

### F. Express Preemption of State Law Under 9 U.S.C. §2

Federal preemption applies whenever state law presents an obstacle to achieving the objectives of Congress. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). State law is also preempted when it is an impediment or frustrates the purpose of the Federal statute. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873–885 (2000). See, also *Fidelity Federal Savings and Loan Association v de la Cuesta*, 458 U.S. 141, 156 (1982)(Federal regulation displaces state law which hinders accomplishment of the Federal goals).

Express preemption applies, because this Court has expressly found that 9 U.S.C. §2 *displaces* state laws which impede or present an obstacle to accomplishing Congress' goal and purpose of making arbitration agreements enforceable according to their terms. *Doctor's Associates*, supra, 517 U.S. at 683, 687. As this Court explained in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273, 275 (1995):

> The Federal Arbitration Act, § 2, provides

> that a "written provision in any... *contract evidencing a transaction involving commerce* to settle by arbitration. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
>
> . . . .
>
> [T]his Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 2525-26, 96 L.Ed.2d 426 (1987) (the Act "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Southland Corp. v. Keating*, 465 U.S., at 14-15, 104 S.Ct., at 860 (the "'involving commerce'" requirement is a constitutionally "necessary qualification" on the Act's reach, marking its permissible outer limit); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S., at 407, 87 S.Ct., at 1807-08 (Harlan, J., concurring) (endorsing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (CA2 1959) (Congress, in enacting the FAA, "took pains to utilize as much of its power as it could")).

Respondent argues that California's "police power" is threatened by this case, because the TAA is a licensing statute. R.B. 38. Since, as noted above, the

California Legislature specifically *exempted* artist's managers from the TAA almost 30 years ago, there is no such threat.

More to the point, Petitioner is *not* challenging a licensing statute, only an *anti-arbitration holding* which is based on the Court of Appeal's strained reading of a provision in that statute. Despite Respondent's effort to re-mold the Question Presented as a test of whether the licensing statute is preempted, all that is at stake here is whether Respondent will have to adjudicate his TAA defense in the arbitral forum he agreed to.

### G. *Southland Corporation v. Keating*

Respondent asks this Court to overrule *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a proposal which actually entails overturning a number of this Court's cases, to say nothing of the hundreds of lower court cases based on that decision. Thus, Respondent also asks the Court to overrule its decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995), where this Court stated:

> [R]espondents, supported by 20 state attorneys general, now ask us to overrule *Southland* and thereby to permit Alabama to apply its antiarbitration statute. . . .Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland's* authority; and no unforeseen

> practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. See, e.g., 9 U.S.C. §15 (eliminating the Act of State doctrine as a bar to arbitration); 9 U.S.C. §§ 201–208 (international arbitration). For these reasons, we find it inappropriate to reconsider what is by now well-established law.

By seeking a reversal of *Southland*, Respondent also asks this Court to overrule its decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,112 (2001), which held:

> We had occasion in *Allied-Bruce*, supra, at 273-277, 115 S.Ct. 834, to consider the significance of Congress' use of the words "involving commerce" in § 2. The analysis began with a *reaffirmation* of earlier decisions concluding that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and that the Act was applicable in state courts and pre-emptive of state laws hostile to

> arbitration, see *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). (Emphasis added)

See, also, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006):

> We *reaffirm* today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." (Emphasis added)

Despite the 23-year history of *Southland*, Respondent argues for an abrupt reversal of this well-settled doctrine, just two years after the Court expressly reaffirmed it by a 7-1 vote. This argument ignores the fact that this Court has long recognized that the doctrine of stare decisis is of fundamental importance to the rule of law. As stated in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991):

> Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .Congress has had almost 30 years in which it could have corrected our decision. . .if it disagreed with it, and

has not chosen to do so.

Adherence to precedent promotes stability, predictability, and respect for judicial authority, which is why this Court has said that it "will not depart from the doctrine of stare decisis without some compelling justification. . . ." *Id.*, 502 U.S. at 202.

"Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved. . . ." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). See, also, *Federal Election Commission v. Wisconsin Right To Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2652, 2686 (2007)(SCALIA, J. concurring in part)(stare decisis analysis should give consideration to "property or contract rights, where reliance interests are involved.").

Petitioner submits that, over the past 23 years, the business community has come to rely on *Southland*, and fashioned contracts based on such reliance. Given this Court's reaffirmation of *Southland* in *Allied-Bruce*, *Circuit City*, and *Buckeye*, Respondent simply has not provided the kind of compelling justification which would justify overturning such a well-settled doctrine.

Finally, Petitioner respectfully submits that overruling *Southland* would lead to a patchwork of anti-arbitration doctrines among the several states, and that, in turn, would result in differing rules of decision, depending on whether the same case was heard in Federal or state court. This would cause a

rush to file petitions to compel arbitration in the U.S. District Courts, and a dramatic increase in removals of such cases from the state courts. In addition to the burden which this would impose on the Federal judiciary, overruling *Southland* would result in an erosion of confidence in the law, resulting from the inevitable forum shopping, which this Court sharply disapproved of in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938).

## CONCLUSION

The Court of Appeal should be *reversed*, and the case should be remanded with an instruction to *vacate* the injunction, *grant* the motion to compel arbitration, and award *costs* to the Petitioner.

Respectfully submitted,

JOSEPH D. SCHLEIMER
*Counsel of Record*
KENNETH D. FREUNDLICH
SCHLEIMER & FREUNDLICH LLP
9100 Wilshire Boulevard
Suite 615 - East Tower
Beverly Hills, California 90212
(310) 273-9807

*Counsel for Petitioner*

December 23, 2007